UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re: SPECIAL COUNSEL INVESTIGATION	)	Case No. 04-MS-407 (TFH)

MOTION OF JUDITH MILLER FOR RECONSIDERATION OF THE COURT'S OCTOBER 7, 2004 ORDER REQUIRING CONFINEMENT "AT A SUITABLE PLACE" OR, IN THE ALTERNATIVE, FOR A SUPPLEMENTAL ORDER DESIGNATING A PARTICULAR "SUITABLE PLACE" OF CONFINEMENT, AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

This case is on remand from the D.C. Circuit, which affirmed on February 15, 2005 this Court's October 7, 2004 Order of contempt for *New York Times* reporter Judith Miller. Ms. Miller, through undersigned counsel, respectfully moves this Court to reconsider whether the Court's requirement of "suitable" confinement would be effectively coercive in this case, rather than merely punitive, where the Court already has observed that her refusal to honor the Special Counsel's grand jury subpoena was action taken in "good faith doing her duty as a responsible and established reporter[,]" and where her principled conduct was "an effort not made except in the highest traditions of the press." (Tr. 10/7/04 at 17-18, 20). We are sure these statements were not made lightly by the Court, and reflect precisely the type of circumstance where confinement would be ineffective and therefore inappropriate in this context.

In the alternative, should the Court nevertheless adhere to its previous order, we respectfully request that a supplemental order be issued designating a very restrictive form of home detention, with intrusive conditions as suggested below and accompanied by electronic monitoring (the cost of which would be borne privately instead of by the taxpayers) as the "suitable place" for Ms. Miller's confinement. Finally, once again in the alternative, should the Court reject our plea for home detention we respectfully request the issuance of a supplemental

order providing for a specific designation of a place of incarceration at a particular facility run by the Federal Bureau of Prisons, namely, the Federal Prison Camp for women located in Danbury, Connecticut. This facility is safe, relatively near to the Court, and near to Ms. Miller's 76 year-old husband, who resides in New York City.

BACKGROUND

The facts underlying this controversy are well-known to the Court, and bear only a brief outline here. On August 12 and 14, 2004, Ms. Miller received grand jury subpoenas, for testimony and documents, from the Special Counsel investigating potential violations of the Intelligence Identities Protection Act.[1] Pertinent here, the document subpoena called for production of notes, email, memos or other documents relating to any conversations Ms. Miller may have had with a government official from on or about July 6 through July 13, 2003, concerning Valerie Plame Wilson or Iraqi efforts to obtain uranium, regardless of whether the conversations referenced were "on the record, off the record, on background, or on deep background . . . ." The testimony sought from Ms. Miller concerned those conversations, if there

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[1] The statute, 50 U.S.C. § 421, criminalizes the intentional disclosure of a covert agent's identity to someone not authorized to receive classified information, with knowledge that the government is taking affirmative measures to conceal the agent's intelligence relationship with the United States. The statute was designed to proscribe "those disclosures which represent a conscious and pernicious effort to identify and expose agents with *the intent to impair or impede the foreign intelligence activities of the United States* . . . ." S. Rep. No. 97-201, at 12, *reprinted in* 1982 U.S.C.C.A.N. 145, 156 (emphasis added); *see also* Elizabeth B. Bazan, Report for Congress, *Intelligence Identities Protection Act*, Oct. 3, 2003 (discussing purpose of statute), *available at* http://www.fas.org/irp/crs/ RS21636.pdf (last visited June 26, 2005). We are aware of no published cases involving prosecutions under the statute, and are aware of no evidence of such intent in this case. The Senate Report states that the limited harm at which the statute is aimed should "exclude the possibility that casual discussion, political debate, the journalistic pursuit of a story on intelligence, or the disclosure of illegality or impropriety in government will be chilled by the enactment of the bill." S. Rep. No. 97-201, at 12.

were any. Ms. Miller timely moved to quash both subpoenas on First Amendment and federal common law grounds. The motion was denied by this Court on September 9, 2004. Special Counsel's subsequent contempt motion led to the Court's October 7, 2004 Order holding her in civil contempt.[2]

On February 15, 2005, the Court of Appeals affirmed this Court's October 7, 2004 Order. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). Despite disparate concurring opinions from each member of the panel, on April 19, 2005, the Court of Appeals denied Ms. Miller's motion for reconsideration and suggestion for rehearing *en banc*. *In re Grand Jury Subpoena*, 405 F.3d 17 (D.C. Cir. 2005). By order dated April 27, 2005, the Court of Appeals stayed the issuance of the mandate pending Supreme Court review.

Certiorari was denied on June 27, 2005, and the case thereafter was returned to this Court for further proceedings. On June 29, 2005, at a scheduling hearing, this Court set a briefing schedule authorizing this filing today. The issue now on remand is whether the circumstances of Ms. Miller's case continue to warrant an order of confinement – as effectively coercive of her testimony – and, if so, what constitutes confinement "at a suitable place" within the meaning of the Court's Order.

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[2] Having attended every Court appearance as ordered, Ms. Miller remained on personal recognizance pending appeal, after the Court found that an appeal would be "brought in good faith and raises substantial issues of law," and in light of the parties' agreement to approach the Court of Appeals on an expedited basis. (10/7/04 Order at 1).

ARGUMENT

I. RECONSIDERATION OF THE ORDER OF CONFINEMENT IS WARRANTED.

The Court has observed aptly that this important case involves "a classic confrontation between conflicting interests . . . the freedom of the press and the right of the public to know certain matters and the right of the public to also have the government investigate criminal activity before a grand jury." (Tr. 10/7/04 at 18). Indeed, this dispute over large principles has sparked national controversy over the rights of journalists vis á vis the government, and has generated proposed reporter "shield" legislation in Congress.[3] As a prominent investigative reporter covering national security and foreign policy issues including terrorism, there can be no question but that Ms. Miller must enjoy confidential access to high-level government sources in order to continue her journalistic efforts in furtherance of the public's right to know.[4] Nothing less will do in a free society with an independent press.

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[3] There has been a recent sharp rise in government subpoenas issued to reporters. "According to the Reporters Committee for Freedom of the Press, 22 reporters have received subpoenas this year [2004] alone, compared with an average of fewer than nine per year from 1991 to 2001." *See* Christopher J. Dodd, *Reporting at Risk*, Wash. Post, Dec. 28, 2004, at A19. *Cf. also Lee v. Dep't of Justice*, 2005 WL 1513086 (D.C. Cir. 2005) (affirming orders of contempt). Senator Dodd (D-CT) introduced the referenced "shield" legislation on November 19, 2004. *See* Free Speech Protection Act of 2004, S. 3020, 108th Congress (2004). Less than two months into the current legislative session, three proposals for "shield" legislation were introduced with bipartisan support. *See* Free Flow of Information Act of 2005, H.R. 581, 109th Congress (2005)(submitted by Reps. Mike Pence (R-IN) and Rick Boucher (D-VA)); Free Flow of Information Act of 2005, S. 340, 109th Congress (2005)(submitted by Sen. Richard Lugar (R-IN)); Free Speech Protection Act of 2005, S. 369, 109th Congress (2005)(submitted by Sen. Christopher J. Dodd (D-CT)).

[4] On this record, it is undisputed that "[a] reporter who obeys a court order to disclose a source to whom he has promised confidentiality would seriously damage his ability to cover government in the future." (Affidavit of Jack Nelson at ¶7, attached as Exh. E to the Affidavit of Floyd Abrams, Memorandum of Points and Authorities in Support of the Motion of Judith Miller to Quash Subpoenas and/or for Protective Order).

Ironically, the same government that in the past has granted Ms. Miller high-level security clearances, and entrusted her to keep some of our Nation's most compelling secrets while in Iraq, is now seeking her incarceration for refusal to divulge her alleged source(s) even though she published nothing concerning Ms. Plame. Ms. Miller has stated publicly, by affidavit, and through her counsel to this Court, that her refusal to testify is predicated upon the principle of journalistic independence based upon the First Amendment. Specifically, when sources seek to discuss facts of public importance with investigative reporters and wish to withhold their identities, the reporters must be able to afford reliable assurances that the sources will be protected. Absent this, the government will be free to interpose itself between reporter and source, important information will become yet more tightly held, and the public's right to know will suffer irreparably.

We respectfully submit that, due to Ms. Miller's principled motive for her silence as acknowledged by the Court, the order of "suitable" confinement should be reconsidered at this time because depriving Ms. Miller of her physical liberty offers absolutely no realistic likelihood of being effectively coercive. The purpose of 18 U.S.C. § 1826, is not to punish, but to coerce compliance from a recalcitrant witness. *See Shillitani v. United States*, 384 U.S. 364, 369-70 (1966). To this end, district courts are afforded broad discretion to impose appropriate coercive measures.[5] The contempt power itself, however, is "narrowly circumscribed." *Perez v. Danbury Hospital*, 347 F.3d 419, 423 (2d Cir. 2003). Before sanctioning a witness, the Court must first determine if there exists a "likelihood" that a sanction will coerce the testimony. The standard,

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[5] *See, e.g., Lee v. United States Dep't of Justice*, 327 F. Supp. 2d 26, 33 (D.D.C. 2004); *Paramedics Electromedicina Comercial, Ltd. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645, 657 (2d Cir. 2004)("'To the extent that a contempt sanction is coercive, the court has broad discretion to design a remedy that will bring about compliance.'")(citation omitted).

which must be applied after considering the personal situation of the individual contemnor, is that the likelihood must be "realistic" and "substantial," not merely hypothetical or hopeful.[6]

We acknowledge that no confinement has yet been imposed, but firmly believe nonetheless that confinement would only be punitive in this instance and, therefore, inappropriate due to Ms. Miller's unwavering determination to not betray her alleged source(s). Indeed, relevant to the Court's consideration of whether confinement is appropriate at all is the contemnor's avowal that she will not testify, *Sanchez v. United States*, 725 F.2d 29, 31 (2nd Cir. 1984), and a commitment to remain steadfast in her convictions despite the threat of sanction. *Matter of Ford*, 615 F.Supp. 259 (S.D.N.Y. 1985). A principled motive underpinning such a declaration is also important. *See, e.g., In re Cueto*, 443 F. Supp. 857, 858-860 (S.D.N.Y. 1978)(contemnors, lay ministers in the Episcopal church, though "without support in law" were acting in good faith based upon deep seated moral and religious convictions). Indeed, courts have credited such steadfastness in cases where others in an identifiable group – here, journalists – share the contemnor's publicly-expressed moral convictions.[7]

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6 *See, e.g., Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525 (11th Cir. 1992)("realistic possibility"), *quoting In Re Grand Jury Proceedings (Howald)*, 877 F.2d 849, 850 (11th Cir. 1989); *Simkin v. United States*, 715 F.2d 34, 37-38 (2nd Cir. 1983)(same); *Lambert v. Montana*, 545 F.2d 87, 90 (9th Cir. 1976) ("substantial likelihood"); *see also In re Cantazaro*, 663 F. Supp. 1, 2 (D.D.C. 1985)(citing cases using both standards, used interchangeably).

7 *See, e.g., United States v. Buck*, 1987 WL 15520 at * 3 (S.D.N.Y. July 31, 1987)(confinement not imposed on civil contemnor because refusal to cooperate was based on moral principle and a "number of other individuals associated with the causes . . . [had] gone to prison without being coerced, prior to their releases"); *In re Thomas*, 614 F.Supp. 983, 984 (S.D.N.Y. 1985)("support of an organized group of individuals" increases credibility of stated intention to not testify); *In re Cueto*, 443 F.Supp. 857, 860 (S.D.N.Y. 1978) (contemnors "believe themselves compelled to continue in their stance of defiance because of their religious convictions and commitments . . . that [are] supported by a not insignificant segment of their Church's hierarchy [and which provide] an articulated moral basis for their recalcitrance.").

In *Matter of Ford*, for instance, the district court determined that further incarceration would not coerce Dr. Ford to testify where the "contemnor has shown by a preponderance of the evidence that he is unlikely to be coerced by continued confinement." 615 F.Supp. at 261 (citation omitted). In reaching this conclusion, the court looked to Dr. Ford's long history of political activism and his public association with a group of "grand jury resisters." *Id.* at 262. Though the court questioned whether Dr. Ford's principled convictions alone could support his argument for release, it ultimately found that:

> [I]n the context of this particular case, he sees himself as a political crusader and enjoys the support and attention of not only his fellow contemnors but also that portion of the community which supports the underlying 'cause.' The element of 'group think' generated by an organized group of individuals . . . may well be the sole reason for Dr. Ford's refusal to testify and in any event, plainly reinforces his decision to remain silent.

Id. at 262. Based on Dr. Ford's position and the existence of considerable group support, the court concluded that further sanction was inappropriate because he was "unlikely to change his mind[.]" *Id.*

Ms. Miller's moral and principled stance in this controversy has been unchanged from the beginning. In her August 14, 2004 affidavit to this Court, she explained:

> One or more of those sources insisted as a precondition to providing information to me that I agree to maintain the confidentiality of their identity. I cannot testify about any communications I may have had . . . . * * * Compelling me to disclose what I may have discussed with people to whom I pledged confidentiality would not only render the pledges I gave them meaningless, it would make it virtually impossible for me to continue reporting in this most sensitive, but important, of government endeavors. * * * I cannot violate this pledge and be true to my profession.[8]

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[8] Affidavit of Judith Miller, dated August 19, 2004, filed in support of Memorandum of Points and Authorities in Support of the Motion of Judith Miller to Quash Subpoenas and/or for Protective Order, at ¶¶ 5-6, 14-15.

More recently, in the wake of the Court of Appeal's ruling, Ms. Miller publicly reiterated her position:

> I have to be willing to go to prison. I think the principles at stake in this case are so important to the functioning of a free press and to the confidentiality of sources that I just have to be willing to do that.[9]

And on the morning the Supreme Court ruled, June 27, 2005, Ms. Miller had this observation: "I keep saying this is not about me. And it's not about me. . . . [I]t's about the kind of news people are going to get."[10]

These beliefs go to the core of Ms. Miller's being, and she has the strong and public support of her employer, colleagues, political and opinion leaders, and members of the United States Army who entrusted her in Iraq with confidential information – the release of which could have had drastic consequences. Specifically with respect to the latter, several officers who have witnessed Ms. Miller perform under challenging conditions in the Iraqi field attest (i) to her absolute professional commitment to maintaining the highest secrecy entrusted to her by the government; (ii) to her "deep commitment to her work and values as an American citizen"; (iii) to the fact that she "is clearly a highly professional journalist, one who has demonstrated . . . that she will keep her word"; and (iv) that she is uncompromising and therefore would most likely maintain confidences with sources. Indeed, these are the views of Lieutenant General David H. Petraeus, now the Commanding General of the Multinational Security

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9 Howard Kurtz, *Contempt & Praise for Reporter; Facing Jail, Judith Miller Gains Support for Stance*, Wash. Post, Feb. 17, 2005, at C1 (quoting Ms. Miller's February 15, 2005 interview on CNN).

10 American Morning Show, CNN, available at http://transcripts.cnn.com/TRANSCRIPTS/0506/27/ltm.04.html.

Transition Command in Iraq; other military officials attest to the same effect that Ms. Miller would not "reveal secrets or her confidential sources under any circumstances."[11]

Should the Court determine in fact that Ms. Miller would not likely be coerced due to her principled and very public stance as a journalist who depends upon the First Amendment every day, *see In re Farr*, 36 Cal. App. 3d 577, 584 (1974) (journalistic principle), the Court has the power, if not the duty, to conclude that no confinement is warranted.[12] Indeed, the law is settled that, to the extent the Court should conclude that confinement will "realistically" have no effect in this case, it should not be imposed despite an earlier finding of contempt. *See In re Grand Jury Proceedings*, 280 F.3d 1103, 1109 (7th Cir. 2002). The law holds that a contemnor is permitted in this context "to demonstrate, even in advance of confinement, the likelihood that confinement will only punish because it will never coerce." *Buck*, 1987 WL 15520 at *2 (citation omitted). Such is the case here. We sincerely believe that, despite the Special Counsel's arguments, reconsideration of the confinement order is manifestly the right result.

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11 *See* Letter from Lt. Gen. David H. Petraeus, to Judge Thomas Hogan (Feb. 16, 2005) ("Based on my interaction with her, I find it unlikely that Judith would compromise on [her] values, to include betraying information gained in confidence from her sources.") (Exh. 1); Letter from Lieutenant Colonel Michael Endres, Maj. Mark Jones (Chaplain), *et al.*, to Judge Thomas Hogan (Feb. 15, 2005)("Ms. Miller would never reveal what she learned, how she learned it, or from whom she learned it. This was important for us. [W]e do not believe she would reveal secrets or her confidential sources under any circumstances.") (Exh. 2)(note, two asterisked signatures could not be obtained on short notice given deployments abroad); *accord* Kurtz, n. 9, above; William Safire, *The Jailing of Judith Miller*, The New York Times, June 29, 2005, at A23 ("I have known Judy Miller, a superb and intrepid reporter, for a generation; she'll never betray a source.").

12 *In re Grand Jury Proceedings*, 280 F.3d 1103, 1109 (7th Cir. 2002); *Lambert*, 545 F.2d at 89-91; *In re Dohrn*, 560 F.Supp. 179 (S.D.N.Y. 1983).

II. IN THE ALTERNATIVE, THE COURT SHOULD ENTER A SUPPLEMENTAL ORDER SPECIFYING THE "SUITABLE PLACE" FOR AND MANNER OF CONFINEMENT IN THIS CASE.

A. The District Court is Entrusted With Broad Discretion in Imposing an Appropriately Coercive Sanction.

Should the Court find that there is at this time a realistic likely prospect that "suitable" confinement of some type would in fact coerce Ms. Miller's compliance with the grand jury subpoenas, we respectfully request that the Court make an individualized determination of the least restrictive confinement necessary in this case, which is required. *See Simkin v. United States*, 715 F.2d 34, 38-39 (2nd Cir. 1983)(remand because determination that coercion would work must be made on a case-by-case "individualized" basis). In the civil contempt context, the Supreme Court has held that courts should utilize the "'least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U.S. 364, 371 (1966) *quoting Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).[13] Such an individualized determination, given the particulars of this case, should as set forth below result in Ms. Miller's confinement under no more than very restrictive home detention conditions. In the alternative, also set forth below, if the Court deems something more restrictive as absolutely necessary at this time then we request that the Court's supplemental order specify the Federal Prison Camp for women at Danbury, Connecticut, as the "suitable place" for Ms. Miller's confinement.

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13 *See also Spallone v. United States*, 493 U.S. 265, 280 (1990) (same); *United States v. Wilson*, 421 U.S. 309, 319 (1975); *United States v. Johnson*, 736 F.2d 358, 362 (6th Cir. 1984)("One of the most fundamental principles of the law of contempt is that a court must exercise only the 'least possible power adequate to the end proposed.'"), *quoting Shillitani*, 384 U.S. at 371.

B. Should the Court Determine Confinement is Warranted, Restrictive Home Detention is Sufficiently Coercive Given the Circumstances Presented Here.

Following the "least possible power" admonition from the Supreme Court, we respectfully submit that a very restrictive home detention setting, approximating the conditions Ms. Miller would face inside a federal prison facility, would adequately serve the coercive aspect of any sanction entered against her.[14] Settled principles guide the Court's discretion in this area. Specifically, in evaluating the coercive effect of incarceration in the civil contempt context courts look to the importance of the information withheld, *see Cueto*, 443 F. Supp. at 864-65 (information sought is "stale"); *In re Jean-Baptiste*, 1985 WL 1863 at * 3 (S.D.N.Y. July 5, 1985) (considering need for the witness' evidence), the motive animating the contemnor's recalcitrance and whether coercion is therefore likely to work, *see id. at* *3 (contemnor sincerely viewed himself as a "crusader" with "passionately held principles"); *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984) (consideration of "contemnor's avowed intention never to testify"), as well as the contemnor's "[a]ge, state of health, and length of confinement." *Lambert v. Montana*, 545 F.2d 87, 90 (9th Cir. 1976) (citation omitted). Courts also have considered:

> (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and the consequent seriousness of the burden of the sanction upon him.

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14 Failing to impose the least restrictive sanction means imposing a sanction that exceeds the coercive purpose of the recalcitrant witness statute, rising to the level of punishment. Once a sanction for civil contempt becomes akin to punishment, the sanction is no longer appropriate. *See, e.g., Soobzokov v. CBS, Inc.*, 642 F.2d 28, 31 (2nd Cir. 1981). Recognizing this limitation is particularly important when a court considers incarceration, the "harshest sanction available" for civil contempt. *See id.* at 31.

Dole Fresh Fruit Co. v. United Banana Co., 821 F.2d 106, 110 (2d Cir. 1987)(evaluating monetary sanction); *United States v. United Mine Workers of America*, 330 U.S. 258, 304 (1947)(same).

To the extent the Court deems some form of confinement appropriate, in accord with the above criteria we respectfully suggest that very restrictive home confinement would be the harshest sanction necessary to fulfill the coercive purpose of Section 1826 without becoming unduly punitive in the context of this case. This is because denying the attributes of everyday living that are the most important to Ms. Miller – namely, impairing her unrestricted ability to do her job as an investigative journalist through regular access to government and other individual sources, and accessing tools necessary to that task such as the internet and a cell phone – would present the strictest form of coercion as to her. The *setting* for such deprivation – whether detained at home at private expense or in a federal correctional institution at taxpayer expense – essentially would be beside the point of this coercion given Ms. Miller's need to work and stated motivation for refusing to testify.[15] In addition, while we do not believe we can argue in good faith that Ms. Miller's physical health requires imposition of home detention, Ms. Miller's need for regular medical examinations by various specialized physicians for ailments not uncommon to someone of her age would make formal incarceration in a federal facility problematic – and would therefore militate in favor of a home detention setting for health reasons.[16] Also relevant to consider is the health of Ms. Miller's 76 year-old husband.[17] A formal prison setting is

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15 Also of note is the fact that home detention would be less costly than incarceration. *See, e.g., United States v. Willis*, 322 F. Supp. 2d 76, 85 (D.Mass. 2004).

16 Filed separately under seal, as Confidential Exh. 3 and Confidential Exh. 4, are recent declarations of treating physicians.

17 *See* Confidential Exh. 4 at ¶¶ 4-6.

unnecessary; to impose imprisonment instead of home detention would be a punitive form of overkill, particularly in light of the "character and magnitude of the harm threatened by the continued contumacy" and given the Court's finding that Ms. Miller's conduct is consistent with nothing less than "the highest traditions of the press."[18]

Under restrictive home confinement, Ms. Miller would be unable to function normally as an investigative journalist – publishing the articles for which she is known. Such restriction could therefore be deemed adequately coercive. For the past thirty years Ms. Miller has functioned in the public eye as an investigative reporter for *The New York Times*, traveling throughout the United States and the world. She has won a Pulitzer Prize and Emmy Award for her work, keeping the public informed about important issues of the day. Ms. Miller's work matters to the public – but relevant here is the fact that it matters to her. Her reliance on and need for regular confidential contact with sources and other individuals cannot be overstated. Nor can her need for state-of-the-art tools – the internet and a cell phone – be denied. The removal of these could be viewed reasonably as highly coercive.

Within a federal prison facility, according to the Bureau of Prisons regulations and Program Statements, visitation would be limited, telephone use would be very restricted, and Ms. Miller would have no access to the internet or a cell phone. *See generally* United States Department of Justice, Bureau of Prisons, Legal Resource Guide to the Federal Bureau of

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18 While we acknowledge representations made recently to this Court about the unchanged nature of the investigation, reports suggest that the Special Counsel's probe might now have turned away from a substantive investigation of whether the Intelligence Identities Protection Act was violated to one involving perjury or other obstructive conduct by witnesses. *E.g.*, Carol D. Leonnig, *Probe Into Leak of CIA Agent's Identity May Be Nearly Complete*, Wash. Post (Apr. 7, 2005).

Prisons 2004.[19] Should a sanction be found necessary at this time, we would support the Court's order of very restrictive home detention with a combination of these same deprivations, essentially to isolate Ms. Miller and impair her ability to work as a reporter, as part of a coercive package that would thereby implement the "least possible power adequate to the end proposed" in this case.

In anticipation of filing this motion, and in making the above proposal, we explored informally with the United States Probation Office in the Southern District of New York, as well as the private firm of General Security Services Corporation ("GSSC"), the logistics and cost of supervising and otherwise monitoring restrictive conditions of home detention.[20] According to the United States Probation Office, the type of restrictive home detention conditions proposed here is not uncommon, may be initiated at the Court's direction in the civil contempt context, and can be monitored reliably through that Office with an electronic bracelet and regular reporting by Ms. Miller. As an alternative, GSSC, a national commercial

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19 Within Bureau of Prison facilities (i) telephone privileges are limited to 300 minutes per month, *see* 28 C.F.R. § 540.100, *et seq., Subpart I - Telephone Regulations for Inmate*; BOP Program Statement 5264.07, *Telephone Regulations for Inmates*; (ii) the ability to receive visitors is limited to certain hours and days of the week, and to a specific list of individuals, *see* BOP Program Statement 5267.07, *Visiting Regulations*; (iii) federal inmates are allowed the use of the mail, but are subject to restrictions on what may be received, *see* 28 C.F.R. § 540.10, *Subpart B-Correspondence*; BOP Program Statement 5265.11, *Correspondence*; (iv) inmates are only allowed to receive commercial publications "which do not threaten security, good order, or discipline of the institution or that may facilitate criminal activity, or are otherwise prohibited by law," 28 C.F.R. § 540.70, *Subpart F-Incoming Publications*; BOP Program Statement 5266.10, *Incoming Publications*; and (v) we understand that inmates are precluded from using the internet and having access to email.

20 GSSC has been operating for over 58 years and has provided restrictive electronic monitoring supervision since 1991. GSSC employs over 1500 people nationwide and provides a variety of security related services to local, State, and Federal agencies. GSSC operates in 40 States, monitoring over 4,000 clients daily on house arrest and over 18,000 clients daily on low risk probation. (*See* Exh. 5).

firm specializing in intensive electronic monitoring, is well-equipped and currently prepared to reliably monitor the conditions of confinement proposed here. The cost of either service can be borne privately, instead of at taxpayer expense.

An order of restrictive home confinement along the lines proposed here is within the Court's "broad discretion" to fashion "an appropriate contempt sanction." *Lee*, 327 F. Supp. 2d at 33. The Court's authority to designate "a suitable place" of confinement includes the ability to order home detention. *See In re Grand Jury Subpoena Served on John Doe*, 889 F.2d 384, 385 (2d Cir. 1989) (noting civil contemnor "remains under house arrest").[21]

Should some "suitable" confinement be deemed necessary, very restrictive home detention – at individual instead of taxpayer cost – would fulfill the mandate that the Court employ "the degree of coercion minimally necessary to gain compliance with its orders." *In re Grand Jury Impaneled Jan. 21, 1975 (Freedman)*, 529 F.2d 543, 551 (3rd Cir. 1976)(warning that a range of sanctions available "do not vest the court with the power to visit Draconian punishment upon the civil contemnor."). Ms. Miller accordingly requests that the Court impose restrictive home detention if it concludes that confinement is absolutely necessary at this time.

C. In the Alternative, the Court Should Designate a Specific Federal Facility as the "Suitable Place" For Ms. Miller's Confinement, Namely, the Federal Prison Camp for Women at Danbury, Connecticut.

We acknowledge the Court's reference to imprisonment at the recent scheduling hearing, but believe for the reasons stated that such a sanction would be unnecessary and excessive.[22] Should the Court decline to place Ms. Miller in home detention, however, she

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21 *Cf. In re Special Proceedings*, 291 F. Supp. 2d 44 (D.R.I. 2003)(home detention for six months with conditions akin to incarceration).

22 We also acknowledge the Court's and Special Counsel's reference to the fact that the grand jury term expires in approximately four months. This period, however, is well in

respectfully requests that the Court remand her specifically to the Federal Prison Camp ("FPC") for women in Danbury, Connecticut.[23] FPC Danbury presents a safe environment, with ready access to the Court and Ms. Miller's husband in New York. The facility has suitable restrictions, and presents a reasonable and safe environment for a civil contemnor in this situation.[24] Absent a specific designation from this Court, Ms. Miller would be remanded to the custody of the U.S. Marshals Service, *see* 28 CFR § 522.11, with the first option for placement being the D.C. Jail. Such placement would be unduly dangerous for a woman in Ms. Miller's situation, and surely unnecessary.

Pursuant to Department of Justice regulations, once a court orders a civil contemnor to a specific Bureau of Prisons facility, the placement must either be as ordered or the Bureau of Prisons must make other arrangements – but only with the designating court's approval. *See* 28 C.F.R. §§ 522.10 - 522.11; BOP Program Statement 5140.33, *Civil Contempt of Court Commitments* at 4. The Bureau of Prisons is authorized to handle federal civil commitments and, in such cases, "the Bureau of Prisons cooperates with the federal courts in

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excess of the time served by newspaper and television journalists held in contempt in other cases.

23 District courts may order that a civil contemnor be held in any jurisdiction. *See SEC v. Bilzerian*, 131 F. Supp. 2d 10, 18-19 (D.D.C. 2001) (Harris, J.)(ordering contemnor to be held in a federal facility in Tampa, Florida). Should Danbury be unavailable, Ms. Miller requests that she be confined at FPC Alderson, West Virginia, another facility for women. Both Danbury and Alderson are approximately equidistant from Washington, D.C.

24 This Court has permitted Ms. Miller to remain at liberty during the appellate process, and as noted she has attended all court appearances. There is no contention that Ms. Miller presents a risk of flight, nor would such a contention be reasonable. Should incarceration be ordered, Ms. Miller respectfully requests that she remain on bail until the time of her designation, and that she be granted five days after notice of this designation to self-report into custody. We are informed that the designation process should take at least 7-10 days, once the Bureau of Prisons is notified of the need to make an assignment to a particular facility.

implementing the sentence by making its facilities and resources available." 28 C.F.R. § 522.10. The Court's designation of a particular facility has a mandatory effect on the Bureau of Prisons; the designation is not a mere "recommendation":

> When the committing court specifies a Bureau of Prisons institution as the place of incarceration in its contempt order, the Bureau of Prisons shall designate that specified facility in accordance with the judicial wishes, unless there is reason for not placing the inmate in that facility, in which case the matter shall be called to the attention of the court and an attempt made to arrive at an acceptable place of confinement with the agreement of the committing court.

28 C.F.R. § 522.11(c).[25]

III. REQUEST FOR PUBLIC HEARING.

Pursuant to Local Rule LCvR 7(f), and following comments made by the Court at the public hearing on June 29, 2005, Ms. Miller respectfully requests that the hearing on July 6, 2005 be held in open court. Although this matter remains under seal as a pending grand jury investigation, "civil contempt proceedings of this kind should be closed to the public only when substantive grand jury matters are being disclosed." *In Re Grand Jury Subpoena*, 97 F.3d 1090, 1095 (8th Cir. 1996). *See also, In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3rd Cir. 1990); *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982). In accord with the Court's comments at the scheduling hearing, we do not expect grand jury matters to be discussed on July 6 given the limited range of issues before the Court at this juncture, and we believe the Court can fashion the hearing in a

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[25] Regardless of where the Court may deem it most appropriate to confine Ms. Miller, she respectfully requests that the Court specifically ensure it will continue to control the conditions and location of her confinement. *See Bilzerian*, 131 F. Supp. 2d at 18-19 (ordering confinement at BOP facility near Tampa, FL due to "special circumstances"). Should the Court not make a specific designation, Ms. Miller will likely be sent to the D.C. Jail, with possible transfer at the discretion of the Bureau of Prisons to another facility.

way designed to not disseminate the confidential medical and personal information filed under seal along with this motion.

CONCLUSION

For the foregoing reasons, Ms. Miller respectfully requests that the Court find Ms. Miller unwilling and realistically unlikely to testify based on journalistic principle grounded on the First Amendment, such that confinement would result only in punishment rather than effective coercion. In the alternative, Ms. Miller asks that the Court confine Ms. Miller by the least restrictive means possible suitable to the end being sought, being mindful of the nature of her motives here and the Court's plenary authority to designate a "suitable" place of confinement. Such consideration should lead to imposition of no more than a very restrictive form of home detention, approximating conditions of incarceration, which would practically impair Ms. Miller's ability to work as a reporter and interact in an unrestrictive fashion with family, friends, sources, colleagues, and the public, while not unduly joepardizing her or her husband's health or safety. In the alternative, Ms. Miller respectfully requests that the Court provide a specific designation in a particular federal facility for any incarceration deemed absolutely necessary, namely, the Federal Prison Camp for women in Danbury, Connecticut, and that she be permitted

to remain on bail pending that designation and self-report for custody five days after the designation occurs.

Dated: July 1, 2005

Respectfully submitted,

By: Robert S. Bennett

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Attorneys for Judith Miller

Of Counsel:

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626707

CERTIFICATE OF SERVICE

I, N. Nathan Dimock hereby certify that a true and correct copy of the foregoing "Motion of Judith Miller for Reconsideration of the Court's October 7, 2004 Order Requiring Confinement 'at a Suitable Place' or, in the alternative, For a Supplemental Order Designating a Particular 'Suitable Place' of Confinement" was this 19 day of July, 2005, filed by and with the Court and served by causing a true and correct copy to be delivered by facsimile and by first-class mail, postage prepaid to the following:

Honorable Patrick J. Fitzgerald
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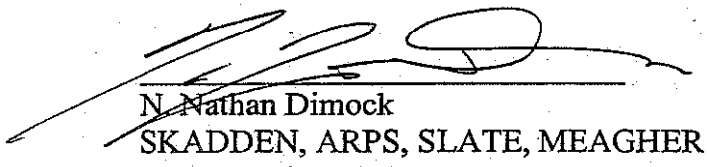

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EXHIBIT 1

Case No. 04-MS-407 (TFH)

Judge Thomas Hogan
Federal District Court
Washington, D.C.

16 February 2005

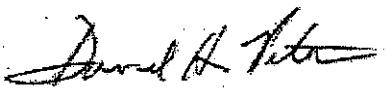
Judge Hogan:

I came to know *New York Times* reporter Judith Miller when she was embedded with a unit operating with the 101st Airborne Division, which I commanded at that time, during operations in Baghdad in April of 2003. I met with her on several occasions in that period. During our discussions, I assessed Judith as being forthright, honest, and cooperative. I also was impressed by her desire to report stories accurately and to avoid sensationalizing them. I subsequently stayed in contact with her by email and met with her in the Spring of 2004 after returning from Iraq.

Throughout our dealings, Judith demonstrated a deep commitment to her work and values as an American citizen. Based on my interaction with her, I find it unlikely that Judith would compromise on those values, to include betraying information gained in confidence from her sources. My sense is that she is equally incapable of consciously reporting information that would threaten American national security. Judith is clearly a highly professional journalist, one who has demonstrated to me that she will keep her word.

I hope this information is helpful as you address Judith's case. The foregoing represents my personal views and is not intended to reflect any official policy or position of any governmental entity.

Sincerely,



David H. Petraeus
Baghdad, Iraq
petraeusdh@mnstci.iraq.centcom.mil

EXHIBIT 2

Case No. 04-MS-407 (TFH)

Judge Thomas Hogan
Federal District Court
Washington D.C.,

February 15, 2005

Dear Judge Hogan:

Judy Miller was the only embedded reporter entrusted with the details of one of the most sensitive operations in the war in Iraq – the hunt for weapons of mass destruction (WMD). As the sole embed with the 75th Exploitation Task Force, she was routinely exposed to secret information, which if compromised could have endangered both operational and national security. Ms. Miller would never reveal what she learned, how she learned it, or from whom she learned it. This was important to us.

Due to the close proximity in which Ms. Miller worked with many of our teams, her exposure to highly classified information was unavoidable. Although she pressed relentlessly to publish information she thought the public should know, she never betrayed our confidence or jeopardized security--in fact, she demonstrated an enormous sensitivity to both.

We understand that Ms Miller's credibility is not the primary consideration to your decision for sentencing her. However, we feel it is important to let you know that during four months of combat operations we came to know her well enough to be sure that her principles would never allow her to compromise our trust or our nation's security. Based on her working with us in this sensitive area, we do not believe she would reveal secrets or her confidential sources under any circumstances.

Respectfully,

Thomas R. Seels, Col, US Army *
Michael Endres, LTC, US Army
Mark Jones, Maj (Chaplain), US Army
Ryan Cutchin, CPT, US Army
Jessica Apgar, CPT, US Army *
David Temby, CW4, US Army
Richard L. Gonzales, CW3, US Army
Tewfik Bolenouar, SPC, US Army

RICHARD L. GONZALES

J. Ryan Cutchin, CPT, FA

Michael T. Endres, LTC, FA - 75TH XTF ops officer

TEWFIK BOULENOUAR,

Steven Mark Jones Chaplain, Major, Brigade Chaplain

CW4, MI

Confidential

EXHIBIT 3

Filed Separately Under Seal

Case No. 04-MS-407 (TFH)

Confidential

EXHIBIT 4

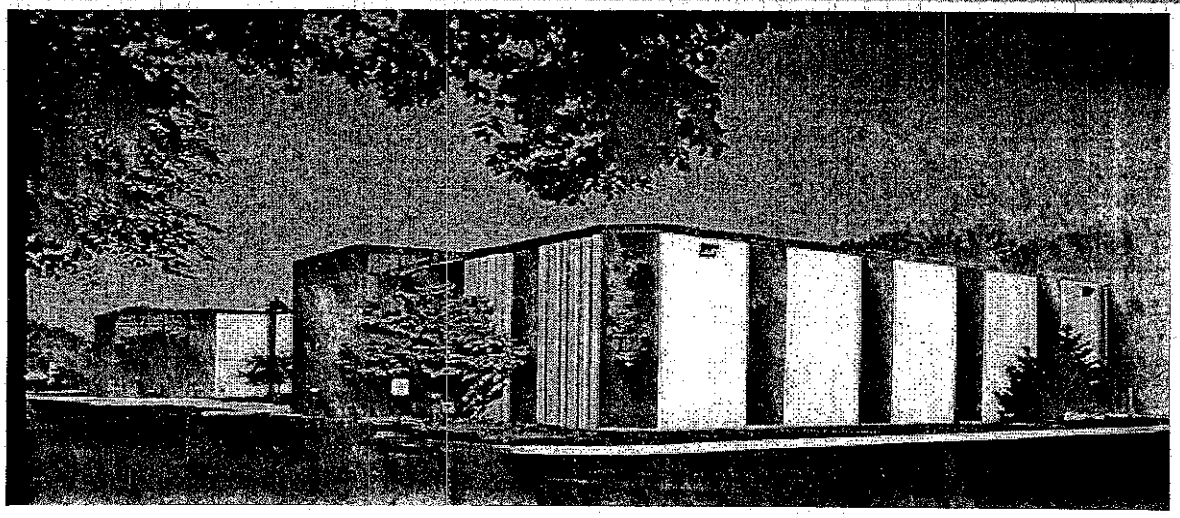
Filed Separately Under Seal

Case No. 04-MS-407 (TFH)

EXHIBIT 5

Case No. 04-MS-407 (TFH)

GENERAL SECURITY SERVICES CORPORATION



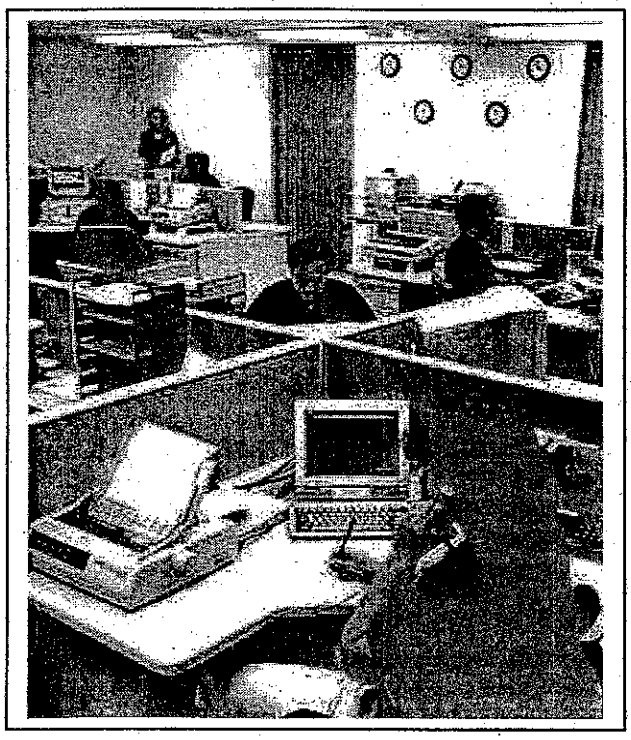
Corporate Headquarters: Minneapolis, Minnesota

General Security Services Corporation (GSSC) is currently in its 58th year of operational excellence. GSSC is a strong and diversified company employing over 1,500 people nationwide providing a variety of security related services to local, State, and Federal agencies. We are proud of the fact we can offer our customers the most diversified and highest quality people, products and services in the industry. We listen to our customers needs and work with them to produce a wide variety of successful security related solutions.

GSSC started Electronic Monitoring services in 1991. Since that time we have grown to provide services in 40 States, monitoring over 4,000 clients daily on house arrest and over 18,000 clients daily on low risk probation. Our monitoring center is UL Certified and among the best in the industry.

For more information on our products and services please contact: Steve Leopold (800) 284-2158

Central Monitoring Center

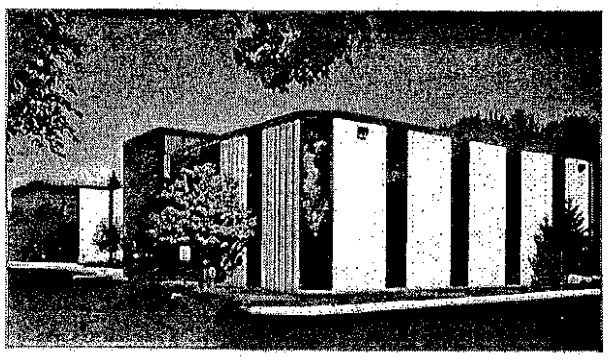


GSSC's U.L. Listed Monitoring Center is located in one of the most secure buildings available. The Monitoring Center is a custom made computer facility with raised flooring for cabling to run underneath. It has redundant heating and cooling units to maintain constant and comfortable temperatures for people and machines. It is also home to Midwest Patrol, our armed and unarmed guard and patrol service. To enter, three separate locked doors must be opened or defeated. Closed Circuit cameras monitor all entrances and the perimeter. Three CCTV units are located in the Monitoring Center itself whereby the Station Manager is able to observe and record all activities of the Center staff. Multiple alarm systems are in the building which activate both in the Center and at an independent alarm center. Operators have variable phone lines to use and two way radio contact with our mobile Patrol at all times.

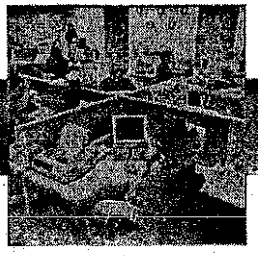
A 24 channel digital voice recorder monitors all voice telephone lines in and out of the Center 24 hours a day. If we are given an approximate date and time, any conversation can be found within minutes. All data lines are monitored by our long distance carrier for signs of problems or abuse and each Host system has multiple safeguards to deter unauthorized access. Three T-1 lines enter the Center from three different directions and provide 72 lines for use by monitor/receivers, faxes, remote terminals and field agents. All computers and work stations in the Center have uninterrupted power supplies to key components and the entire Center is backed up by two 85 Kilowatt gas fired generators, (natural and propane) which can run the operation indefinitely and is tested on full load for 30 minutes each week to comply with U.L. specifications.

Our station is fully staffed and in operation 24 hours a day, 365 days a year. All schedule changes, offender additions and deletions are received and updated promptly on the Host and logged for future reference. All telecommunication services enter GSSC through a fiber optic DS3 line. This fiber pipe enters from two separate locations and breaks out to different phone company central offices. If there is an interruption of phone services anywhere along the path, the service will automatically be re-routed to the redundant path within 50 milliseconds. This essentially gives GSSC six separate and independent paths for our phone service to be brought into our building.

GSSC does provide complete redundant systems for back-up for all monitoring activities. The host monitoring equipment does have multiple layers of back-up built into it. In addition to redundant power supplies and back-up systems, GSSC has devised a unique scheme of redundancies in our high-volume T-1 long distance trunk lines which will handle the 800 traffic for units reporting in from the field. Each host monitoring computer has at least 8 phone lines capable of inbound and outbound calls. These phone lines are split among three separate T-1 lines which run in different directions from our building to the long distance phone switch. This means that in the event of a cable-cut only half of our available phone lines would be affected. Calls would automatically be routed into the other operational lines. This has a very minimal impact on reception of phone calls. GSSC has similar arrangements for a voice call and operating between a long distance and local a T-1 trunk group and can re-route calls with the assistance of our long distance carrier within a matter of minutes.



Full Service Electronic Monitoring



General Security Services Corporation (GSSC) has been providing security excellence since 1946. We are proud of the fact we can offer our customers the most diversified and highest quality people, products and services in the industry. We listen to our customers needs and work with them to produce a wide variety of successful programs in community corrections.

GSSC has been a national leader in the provision of Electronic Monitoring services since 1991. Since that time we have grown to provide services in 40 States. We monitor over 4,000 clients daily on house arrest and over 20,000 clients daily on low risk probation. Our Monitoring Center is U.L. certified and among the best in the industry. We are committed to a level of customer satisfaction above and beyond all others in the Electronic Monitoring industry.

$$$$$$$$$$ More Revenue for your Agency

Our unique rebate program gives you the opportunity to generate more revenue for your agency. If your rate for services exceeds GSSC's service rates, we will refund that amount to your agency. And, with our full service monitoring programs, we manage everything for you. From installation to supervision to fee collections, we do it all.

GSSC
GENERAL SECURITY SERVICES CORPORATION

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GSSC
GENERAL SECURITY SERVICES CORPORATION™

GSSC's Full Service

Electronic Monitoring

Partnership

General Security Services Corporation is an industry leader in providing sensible and economical solutions to the correctional issues of tomorrow. With our Full Service Monitoring Program, we manage every aspect of Electronic Monitoring.

24 hours a day **365 days a year**

Monitoring Control Center

Let our trained experts provide 24 hour, 7 day a week monitoring services for your clients.

- U.L. Listed Monitoring Center
- Professional Operators who are Fully Screened, Trained and Certified
- Low-Cost, High-Quality Electronic Monitoring
- Immediate Client Response
- Schedule Changes, Offender Additions and Deletions are Received and Updated Promptly
- Digital Voice Recording

GSSC's Full Service Monitoring Includes...

Installation

Servicing of Electronic Monitoring equipment by dedicated GSSC employees. We provide all the servicing of equipment including installation, adjustments and equipment removal.

Verification

Verification of clients daily productive activity (employment, treatment, etc...).

Referrals

Simply make referrals by telephone, fax or e-mail to your local GSSC Field Technician. We take everything from there.

Supervision and Accountability

Provided by professional technicians with years of correctional experience. GSSC Field Technicians can easily be reached at any time.

Fee Collection

We will gladly collect any fees associated with the program.

Rebate Program

Our unique rebate program allows your agency to generate revenue or pay for indigent clients based upon fees collected from the offender and costs of the service.

Reporting

All-inclusive reports are immediately provided to the agent upon client enrollment, violation and termination. Complete client progress updates are provided to the referring agent as requested.

Alcohol Monitoring

Complete remote breath alcohol testing is also available.